IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.1239 OF 2005

Lalita Vinayak Joshi & Anr. ...Appellants

Vs.

Chintaman Damodhar Joshi
(since deceased through LRs & Ors.) ...Respondents

Mr.A.S.Rao for the Appellants
Mr.Y.M.Pendse for the Respondent Nos.2,3 and 4.

CORAM: A.S.OKA, J.
DATED: MARCH 16,2006.

P.C.:

1. Heard Advocates for the parties. On 13th March 2006 I have heard the submissions of the learned Advocate for the Appellant. Today I have heard further submissions.

2. The Appeal is preferred by the original Defendants who have suffered a decree for possession in a suit filed by the Respondents.

3. The Appellant No.1 was earlier married to one Bhaskar Gharat. The Appellant No.2 is one of the daughters of the Appellant No.1 from the said Bhaskar Gharat. The case of the Appellants is that the Appellant No.1 obtained customary divorce and her marriage with the said Bhaskar Gharat was dissolved. The case of the Appellant No.1 is that she got married to Vinayak Joshi on 3rd June 1981. The further case of the Appellants is that on 18th March 1997 a will was executed by the said Vinayak by which the entire property of

deceased Vinayak was bequeathed to the Appellant No.2. The Respondents-Plaintiffs filed a suit claiming to be the legal representatives of the deceased Vinayak. Vinayak expired on 27th March 1997. According to the case of the Respondents, Vinayak had no issue and he died intestate. The case of the Respondents is that the Appellants have no right to occupy the suit property and the Appellants are the trespassers.

4. Shri Rao for the Appellants submitted that there is a custom existing in the community to which the Appellant No.1 and her husband Bhaskar Gharat belong which permits a divorce by executing a deed. He submitted that there was a customary divorce between the Appellant No.1 and the said Bhaskar and therefore the marriage between the Appellant No.1 and the deceased Vinayak is legal and valid. He submitted that the Appellants have examined one Shri Sanjay Joshi, Advocate who drafted the will as per the instructions of deceased Vinayak and who has proved the said will. He submitted that as the deceased was suffering from paralysis, it was necessary for Shri Joshi to hold the hand of the deceased Vinayak for affixing his thumb impression. He submitted that this circumstance itself is not sufficient to make out a case for existence of suspicious circumstances. He submitted that the Will has been duly established by examining an attesting witness.

5. I have considered the submissions. As the Appellants

were propounders of the Will, it was for them to establish due execution of the said Will. It is not in dispute that on 18th March 1997 when the said will was allegedly executed, the deceased Vinayak was confined to the bed. The Appellate Court has referred to the statement made by the Appellant No.1 in her deposition that at the relevant time except herself no one was in a position to understand the words which the deceased Vinayak was able to utter. The said Vinayak expired on 27th March 1997. It is in this context that the Appellate Court has considered the evidence of Shri Sanjay Joshi, Advocate. Going by the deposition of the Appellant no.1 it is very difficult to believe that Shri Sanjay Joshi was in a position to communicate effectively with the deceased and to take instructions personally from the deceased regarding the drafting of the Will. Though the deceased was confined to bed, Medical Practitioner has not been examined by the Appellants for certifying that the mental condition of the deceased was sound. Viewed with this perspective, it is very difficult to find fault with findings of fact recorded by both the Courts below that the Appellants have failed to establish the execution of the Will.

6. The Appellants have pleaded that in Mali community customary divorce was permissible. However, there is no evidence of existence of any such custom. The Appellate Court has also noted that even assuming that there was such custom, the document in writing which is signed in presence

of panchas is not produced by the Appellant No.1 to establish customary divorce. No fault can be found with the conclusion of the Appellate Court that the divorce has not been established by the Appellant No.1. If this is the finding of fact, obviously the alleged marriage between the Appellant No.1 and the deceased Vinayak cannot be said to be a lawful marriage.

7. No substantial question of law arises. Second Appeal is dismissed with no order as to costs.

8. At this stage, the Advocate for the Appellants submitted that the Appellants may be may protected for some time. The said request is opposed by the Advocate for the Respondent Nos.2 to 4. Shri Rao for the Appellants stated that if the Appellants give usual undertaking, more time may be granted.

9. Considering the facts and circumstances of the case, decree for possession shall not be executed for a period of six months from today subject to condition that the Appellants will file usual undertaking in this Court within a period of two weeks from today.

10. If undertaking is not filed within stipulated period, decree will become executable forthwith.

Judge.